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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 285

UNITED STATES, EX RELATIONE, GIRARD TRUST COMPANY, TRUSTEE UNDER THE WILL OF JOHN A. BROWN, JR., DECEASED, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

There was no opinion by the District Court for the District of Columbia. The opinion of the United States Court of Appeals for the District of Columbia (R. 33–40) is reported in 85 F. (2d) 230.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered

May 18, 1936. (R. 40–41.) The petition for writ of certiorari was filed August 14, 1936, and granted March 15, 1937. (R. 42.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Should a writ of mandamus issue to compel the Commissioner of Internal Revenue to refund to a trustee taxes found by the Board of Tax Appeals to have been overpaid on the income of the trust, when the refunds would go to the beneficiary of the trust who is obligated to the Government for taxes or erroneous refunds of taxes on the trust income distributed to her, in an amount greater than the overpayments made by the trustee, and enforcement of the beneficiary's liability is barred by the statute of limitations?

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 26–33.

STATEMENT

The case was heard and decided on demurrer to the answer of the Commissioner. (R. 29.) The material facts appearing from the allegations of the petition and answer (R. 2–25) are as follows:

Petitioner is the trustee under the will of John A. Brown, Jr., deceased, and instituted this suit in

that capacity. The decedent died testate July 17, 1919, a resident of Newtown Township, Delaware County, Pennsylvania. By the terms of his will his residuary estate was bequeathed to petitioner in trust, to distribute the net income, to the extent of $200,000 per year, to his widow, Harriet Etting Brown, during her life, and any excess above that amount to his children. (R. 2–3, 7–16.) The widow elected to take under the will in lieu of dower or statutory rights. Petitioner received the property in December, 1920, and has since continued to act as trustee. (R. 3.)

During the years 1924 to 1930, inclusive, petitioner currently distributed to the widow the entire net income of the trust estate and, pursuant to the requirements of Section 219 of the Revenue Act of 1924, and corresponding provisions of the Revenue Acts of 1926 and 1928 (Appendix, *infra*, p. 25) duly filed with the Collector of Internal Revenue income tax returns for the trust estate for each of those years, deducting from the net income of the estate the amounts distributed to the widow. The widow reported all such distributions for the years 1924 to 1927, inclusive, in her income tax returns, and paid a tax thereon. In her return for the year 1928, however, the widow did not include as a part of her taxable income the income received by her from the trust during that year. (R. 3.)

On March 15, 1929, the Commissioner of Internal Revenue duly asserted deficiencies against petitioner for the years 1924 and 1925, basing his action upon a disallowance of the deduction of the amounts distributed to the widow. On May 11, 1929, petitioner appealed to the Board of Tax Appeals, which, on June 23, 1931, entered its decision sustaining the asserted deficiencies of $30,278.28 for 1924, and $16,580.85 for 1925. On December 21, 1931, a petition for review of the Board's decision was filed in the Circuit Court of Appeals for the Third Circuit. Since the assessment and collection of the deficiencies had not been stayed pending review by the filing of a bond under the provisions of Section 1001 of the Revenue Act of 1926 (Appendix, *infra,* pp. 26–27), they were assessed against and paid by petitioner on February 10, 1932, together with interest of $18,279.01. (R. 3–4, 18.) On April 26, 1933, the Circuit Court of Appeals reversed the decree of the Board and, pursuant to the mandate of the appellate court, on July 7, 1934, the Board entered its decision holding that there were no deficiencies due from petitioner for the years 1924 and 1925, but that there were overpayments for such years in the respective amounts paid on February 10, 1932. (R. 4.) That decision became final on August 7, 1934, under the provisions of Section 1005 of the Revenue Act of 1926 (Appendix, *infra,* p. 27).

Under date of January 22, 1931, the Commissioner had asserted a deficiency in the amount of

$10,262.28 against petitioner for the year 1928. On March 6, 1931, petitioner appealed to the Board of Tax Appeals from that determination and the Board, on September 29, 1934, entered a decision pursuant to stipulation, that petitioner had overpaid its taxes for the year 1928 in the amount of $4,376.39. No petition for review of that decision was filed (R. 4–5), and it became final on December 29, 1934. Section 1005, *infra*.

The widow, in the meantime, had filed claims for refund of the taxes paid during the years 1924 to 1927, inclusive, on that portion of her income received from the trust during those years on the ground that the income represented a return of her dower and/or statutory rights which she had relinquished when she had elected to take under her husband's will. (R. 23.) The Commissioner allowed substantially, though not exactly, the amounts claimed on the grounds asserted in the claims, refunding to her in September, 1931, an aggregate of $60,636.12 as taxes, together with statutory interest thereon in the amount of $17,588.73. (R. 24.) No part of these refunds have been repaid by the widow. (R. 25.)

The tax that should have been paid by the widow on the income she received from the trust during the year 1928 is in excess of $4,376.39, the amount of the overpayment found by the Board to have been made by petitioner on its income for that year. (R. 24.)

There are no income, war-profits, or excess profits taxes or installments thereof due from petitioner on any income taxable to it, as such trustee, for any of the years 1924 to 1928, inclusive. (R. 5, 19.)

This action was instituted on February 20, 1935. (R. 2.) The petition prayed that respondent be commanded and directed to refund to petitioner the sum of $65,138.14, and the sum of $4,376.39, representing the amounts of overpayments found by the Board, together with statutory interest on both amounts. (R. 6.)

The petition alleged a demand upon respondent and the latter's refusal to refund the overpayments. (R. 5.) The answer denied that there had been any demand for the refund of the overpayments for the years 1924 and 1925, except that on January 26, 1934, petitioner had filed claims for refund of these amounts. Respondent admitted that those claims for refund had neither been allowed nor rejected, alleging that they were still under his consideration, and that the claims had been on file more than six months at the time this suit was instituted. (R. 19–21.) With reference to the overpayment for 1928, respondent denied that there had been a formal demand for a refund, alleging that petitioner had, by counsel, orally and by informal correspondence requested the refund. Respondent admitted that he had not made the refund, but denied that he had refused it, averring that it was under consideration. (R. 20–23.)

The answer further resisted issuance of the writ on the grounds that it sought to control the exercise of his discretion; that the petitioner had an adequate and complete remedy at law; and that the petition was premature and untimely because it failed to show a formal demand for the refunds and/or a positive refusal, or acts tantamount thereto, to make the same. (R. 21–22.) The answer further asserted that petitioner in equity and good conscience was not entitled to the relief prayed for, since petitioner and the widow were the same parties in interest, and any relief granted would inure to the sole benefit of the widow and would unjustly enrich her, because the refunds made to her were erroneously and mistakenly made and had not been repaid, and because she had failed to pay any tax on the income she received from the trust during 1928. (R. 24–25.)

Petitioner's demurrer to the answer (R. 26–29) was overruled by the District Court for the District of Columbia, and, petitioner electing to stand thereon, the petition was dismissed. (R. 29.) The decision was affirmed on appeal by the United States Court of Appeals for the District of Columbia. (R. 40.)

SUMMARY OF ARGUMENT

1. Mandamus is an inappropriate remedy here, because petitioner has an adequate and complete remedy in ordinary proceedings at law. The right of petitioner to a refund of the amounts deter-

mined to be overpayments by the Board of Tax Appeals may be tested in suits at law in the United States District Courts or the Court of Claims, and the statutes contemplated that procedure.

2. Mandamus is also inappropriate because the granting of a refund of taxes is discretionary rather than ministerial. Moreover, even if there were a duty to make a refund, that duty is not clear and indisputable here, since there are legal doubts as to whether petitioner is entitled to the sums which it seeks. Mandamus cannot be issued as a substitute for ordinary legal proceedings.

3. However, even if mandamus were an appropriate remedy, petitioner is not in equity and good conscience entitled to the issuance of a writ in this case. Although the remedy by mandamus is at law, its allowance is not a matter of right, but is controlled by equitable principles and it may be refused for reasons comparable to those which would lead a court of equity, in the exercise of a sound discretion, to withhold its protection of an undoubted legal right. The record here shows that if petitioner receives the refunds which it seeks, the money will immediately go to the beneficiary, who owes a greater amount to the Government in taxes on the income distributed to her by the trust than the amount which the petitioner here seeks. Nevertheless, recovery from the beneficiary is barred by the statute of limitations. Neither petitioner nor the beneficiary will be prejudiced or injured

by the denial of a writ of mandamus, while the granting of a writ would be highly inequitable to respondent. Under these facts, the writ was properly denied.

4. Furthermore, the same defense of recoupment is available here as is available in *Stone* v. *White*, No. 202, argued herewith. Petitioner seeks refunds of taxes paid for the years 1924, 1925, and 1928 on income earned by the trust and distributed to the beneficiary. The beneficiary to whom these refunds will go, if secured, owes the Government taxes, or erroneous refunds of taxes, on the same income for the same years. The liability of the beneficiary is, however, barred by the statute of limitations. In this situation, respondent is entitled to recoup the liability of the widow against the sums sought to be recovered by petitioner.

ARGUMENT

The Board of Tax Appeals found that the petitioner overpaid its income taxes for the years 1924, 1925 and 1928. The statute, in such cases, provides that the amount of such overpayment shall be credited or refunded to the taxpayer. Sec. 322 (d), Revenue Act of 1928, *infra*, p. 29. The Commissioner failed to refund the amount of such overpayments, on the ground that the beneficiary of the trust of which petitioner is trustee owes the Government a large amount in taxes; and that, while the statute has run against the collection from the beneficiary, it would be inequitable under

the circumstances to make refund to the trustee since such refunds would inure to the benefit of the beneficiary. The circumstances actuating the Commissioner in adopting this course are, as we shall show, substantially the same as those presented in *Stone* v. *White*, No. 202, argued herewith; and for the reasons set forth in our brief in that case we believe the Commissioner was fully justified in the position taken, and the court below so held. But, before discussing the merits, there is a procedural objection which should be called to the Court's attention.

1. The petitioner has chosen mandamus as the means of testing its right to the overpayment. In this, we believe, it erred. Mandamus is an inappropriate remedy in a case of this kind and the petition for the writ should not have been entertained.

It is well settled that the extraordinary remedy of mandamus will not lie where an adequate, complete, and specific remedy at law exists. *In re Winn*, 213 U. S. 458, 466–467; *Reeside* v. *Walker*, 11 How. 271, 291; High on Extraordinary Legal Remedies (3d ed.), Sec. 15.

It is clear that the petitioner here has an adequate, complete, and specific remedy at law. Failing to secure its refund of the overpayment found by the Board, it should have brought its action at law either in the District Court or in the Court of Claims to enforce payment.

The Board of Tax Appeals is a tribunal of limited jurisdiction. It has no authority to order refunds or grant judgments. Its function is to determine whether the Commissioner of Internal Revenue has correctly computed the taxes for a given year, upon which the Commissioner has asserted a deficiency against the taxpayer. Even if, in carrying out this function, the Board finds that there has been an overpayment, that finding is not a determination that the taxpayer is entitled to a credit or refund of that amount. *Jones* v. *Commissioner,* 34 B. T. A. 280; *Dickerman & Englis, Inc.* v. *Commissioner,* 5 B. T. A. 633, 635; *National Fire Ins. Co.* v. *United States,* 52 F. (2d) 1011 (C. Cls.). Compare *Wynne* v. *Commissioner,* 77 F. (2d) 473 (C. C. A. 5th). The decision of the Board is, of course, *res judicata* as to the questions involved in the computation of the taxes of the taxpayer for the year under consideration (*Old Colony Tr. Co.* v. *Commissioner,* 279 U. S. 716), but such decision is not binding as to issues over which the Board has no jurisdiction, and which could not have been raised in that proceeding. Once it has determined a deficiency, or, as in this case, an overpayment of taxes for the year, its duty ends, and its determination does not go to the right of the taxpayer to a refund.

When the Board determines an overpayment the statute provides that such amount shall be refunded or credited (Sec. 322 (d), *infra*), and it

becomes the duty of the Commissioner either to apply the amount against other taxes due from the taxpayer or to schedule for refund any excess. Should the Commissioner fail to do this or should he make an erroneous credit, the taxpayer's course is to bring suit either in the District Court or the Court of Claims. This course is clearly contemplated by the statute. Sec. 284 (d) (2d) of the Revenue Act of 1926, and Sec. 322 (c) (1) and (2) of the Revenue Act of 1928, *infra*, pp. 26, 29. And this is the course which aggrieved claimants take. As pointed out in the case of *National Fire Ins. Co.* v. *United States, supra* (pp. 1013–1014):

> * * * in cases where the Board of Tax Appeals determines an overpayment and no question of credits is involved, and the refund of the overpayment was not barred by the statute of limitation at the time of the decision by the board, suit might be brought within six years from the date the right to the overpayment accrued as for a claim against the United States in the event the commissioner refused to refund the overpayment determined by the board. * * *

See also *James* v. *United States*, 38 F. (2d) 140, 142 (C. Cls.); *Ohio Steel Foundry Co.* v. *United States*, 38 F. (2d) 144, 149 (C. Cls.).

In such proceeding before the District Court or the Court of Claims the taxpayer could secure a final adjucation of the right of the Commissioner to apply its overpayment against the claim of the Government against the beneficiary.

It is respectfully submitted that petitioner has an adequate legal remedy elsewhere and mandamus is inappropriate.

2. There is another reason why mandamus is improper. It is, of course, elementary that mandamus will only lie to enforce a ministerial, as distinguished from a discretionary, duty. Moreover, the duty to be enforced must be a duty which exisits at the time when the application for the mandamus is made. As stated by this Court in *Ex parte Rowland,* 104 U. S. 604, 612, "it is also settled that more cannot be required of a public officer by *mandamus* than the law has made it his duty to do. The object of the writ is to enforce the performance of an existing duty, not to create a new one." Moreover, the obligation must be both peremptory and plainly defined. The law must not only authorize the act (*Commonwealth* v. *Boutwell,* 13 Wall. 526), but it must *require* the act to be done. *Reeside* v. *Walker,* 11 How. 272; *Secretary* v. *McGarrahan,* 9 Wall. 298; and the duty must be "clear and indisputable." *Board of Commissioners of Knox County* v. *Aspinwall,* 24 How. 376; *International Contracting Co.* v. *Lamont,* 155 U. S. 303, 308; *Louisiana* v. *McAdoo,* 234 U. S. 627, 633; *Work* v. *Rives,* 267 U. S. 175; *United States* v. *Wilbur,* 283 U. S. 414, 420. It is submitted that under these principles mandamus does not lie to compel a refund of the overpayment found by the Board.

The duties of the Commissioner, under the circumstances, are discretionary and not ministerial.

Under Section 3220 of the Revised Statutes, as amended, *infra,* p. 30, the Commissioner, subject to regulations prescribed by the Secretary of the Treasury, is *authorized* to refund taxes erroneously collected. However, when the Board of Tax Appeals has found that the taxpayer has made an overpayment, and such decision has become final, the statute (Sec. 507, Revenue Act of 1928, *infra*), provides that such amount "*shall* be *credited or* refunded" as provided in Section 284 (a) of the Revenue Act of 1926, *infra.* That section provides that "where there has been an overpayment, * * * the amount of such overpayment shall * * * be credited against any income, war-profits, or excess profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer." See also Section 322 (a) and (d), Revenue Act of 1928, pp. 28–29, *infra.* The question of whether other taxes are due is, of course, a question left largely within the judgment of the Commissioner. (See Sec. 272, Revenue Act of 1928, *infra.*) Thus, the statute imposes the dual duty on the Commissioner, in cases where the Board has found an overpayment, either to credit or to refund. It has been said that "the matter of the application of the credits is generally within the sound discretion of the Commissioner." *W. H. Hill Co.* v. *Commissioner,* 23 B. T. A. 605, 609, affirmed, 64 F. (2d) 506 (C. C. A. 6th), certiorari denied, 290 U. S. 691. And it

would seem that while mandamus may lie to compel the Commissioner to take action in the matter and either to make the refund or the credit, clearly it will not be used to compel a refund if, in his judgment, other taxes are due from the taxpayer. See *Wilbur* v. *United States,* 281 U. S. 206, 218. Even though the Commissioner be wrong in his decision that other taxes are due, and erroneously applies the overpayment, the remedy lies in a suit at law and not by way of mandamus. Mandamus will not be used to test the legality of the Commissioner's action or to correct his mistake. It lies, as has been said, only to compel the performance of ministerial duties presently existing, not to create new duties. It "cannot be made to serve the purpose of an ordinary suit." *United States* v. *Wilbur,* 283 U. S. 414, 420.

In this case, it appears from the petition for mandamus (R. 5) that the Commissioner has based his refusal to make the refund, on the ground that he was entitled to apply the overpayments of the trustee to the extinguishment of certain barred claims against the beneficiary of the trust. Thus, it appears from the petition itself that the Commissioner has determined to make a credit rather than a refund. True, he undertakes to credit the overpayment against taxes due by the beneficiary rather than those due by the trustee, but it also appears from the petition and admitted answer that the beneficiary is the real party in interest and that any recovery will inure to her benefit.

It further appears that both claims, that of the Commissioner and that of the taxpayer, grow out of the same trust income, in which the beneficiary alone is interested. It further appears that both claims have their roots in an administrative mistake induced by erroneous decisions of three Circuit Courts of Appeals, which mistake was shared in by the beneficiary, who is the real party in interest. It further appears that were the refund to be made it would result in an unjust enrichment to the real party in interest, and the court below has held that such refund would be inequitable. It further appears that the circumstances actuating the Commissioner were substantially the same as those presented in *Stone* v. *White,* No. 202, October Term, 1935, and, as appears from our brief filed in that case simultaneously herewith, the Commissioner was clearly warranted in adopting the course he did. Under these circumstances, it certainly cannot be said that the Commissioner was under a "clear and indisputable" duty to make the refund. Questions of law were presented that called for the exercise of judgment on the part of the Commissioner. In his position of public trust, guardian of the public purse, it can not be said that his obligation was so peremptory and plainly defined as to leave no doubt as to his duty. Even if the Commissioner were mistaken in his view of the law such mistake can and should be corrected elsewhere, and not by mandamus. As was recently said by this Court in *Chicago Great Western Railroad*

Co. v. *Interstate Commerce Commission,* 294 U. S. 50, 63, "where the matter is not beyond peradventure clear we have invariably refused the writ, even though the question were one of law as to the extent of the statutory power of an administrative officer or body." Cf. *Kendall* v. *United States,* 12 Pet. 524; *Decatur* v. *Paulding,* 14 Pet. 497; *United States* v. *Guthrie,* 17 How. 284; *United States ex rel Dunlap* v. *Black,* 128 U. S. 40; *Redfield* v. *Windom,* 137 U. S. 636, 646.

3. Even if mandamus were an appropriate remedy in these cases, petitioner here is not entitled in equity and good conscience to the issuance of a writ. Although the remedy by mandamus is at law, its allowance is controlled by equitable principles and it may be refused for reasons comparable to those which would lead a court of equity, in the exercise of a sound discretion, to withhold its protection of an undoubted legal right. *United States* v. *Dern,* 289 U. S. 352, 359. Mandamus is not a writ of right. It issues to remedy a wrong, not to promote one. It is granted to compel the performance of a duty which ought to be perfomed, not to direct an act which will work a public or private mischief. *Duncan Townsite Co.* v. *Lane,* 245 U. S. 308, 311; *Turner* v. *Fisher,* 222 U. S. 204, 209. Even if, therefore, it were to be held that mandamus was an appropriate remedy in situations where the Board of Tax Appeals had determined an overpayment, before a writ of mandamus

may be secured in such a case the taxpayer must show that in equity and good conscience he is entitled to the relief which he seeks, just as in an action for money had and received, like that in *Stone* v. *White,* a taxpayer must show that in equity and good conscience he is entitled to a recovery.

Since the facts here are substantially the same as the facts in *Stone* v. *White,* we respectfully refer the Court to our argument on pages 14–21 of that brief on the lack of equity inherent in the position of the taxpayers in these cases. The only way in which this case differs from *Stone* v. *White* is that here the widow is liable for taxes on income distributed to her by petitioner for two years—1926 and 1927—as to which no taxes were assessed against petitioner and no refund is sought by petitioner in this case. This fact, however, does not make any the less inequitable the relief which petitioner seeks.

While the taxes for 1924, 1925, and 1928 were erroneously assessed against the trust, and the trustee is the nominal plaintiff in this case, the right being sued upon is in reality the right of the widow. There is vested in her what amounts to a property right in this cause of action. The widow herself has paid or must ultimately pay the taxes assessed against the trust through the *pro tanto* reduction of the income distributed to her by petitioner. Under the codicil to the will (R. 14–16),

the widow was entitled to all of the income from the trust up to the amount of $200,000 per annum, but in determining that income, all taxes payable by the trust were to be deducted. Since the income of the trust during the years in question was less than $200,000, and was all paid to the widow (R. 3), the taxes paid by the trust in this case were a legal charge on that income and must be borne by the widow.

Looking at the substance and equity of this proceeding, then, as we must do to determine whether petitioner is entitled to the relief which it seeks, we find that the taxes on the trust income, which petitioner seeks to recover, have been in reality paid by the widow herself and that they were not greater in total amount than the amount owing by her to the Government for taxes due and for erroneous refunds of taxes paid on the trust income. She has not been injured by the erroneous method of the collection of these taxes. On the contrary, she has benefited thereby, because through the trustee she has paid less in taxes on the income of the trust than she would have paid if the taxes had been collected directly from her. Consequently, the denial of a writ of mandamus by the courts below has worked no inequity or hardship upon her, nor has that denial worked any inequity or hardship upon petitioner, since petitioner has recouped, or has the right to recoup, out of the income payable to the widow the taxes which it has paid to the Government.

But petitioner argues that there is no equity in respondent's position, because that position resulted from official neglect and inaction. On the contrary, however, the Government officials had an entirely reasonable basis for believing that the law was settled by the concurring opinions of three Circuit Courts of Appeals[1] and were justified in refunding the taxes to the widow on the strength of those decisions and on the strength of the decision of the Board of Tax Appeals upholding the assessments for 1924 and 1925 on this income against petitioner. It is true that a few months before the expiration of the two year statute of limitations on the recovery of these refunds, one Circuit Court of Appeals announced for the first time the contrary doctrine.[2] We submit, however, that the Government officials were still justified in acting on the basis of the decisions of the three Circuits, and cannot be said to have been guilty of laches in not instituting law suits on the large number of refunds made in cases of this type until this Court finally settled the matter in *Helvering* v. *Butterworth*, 290 U. S. 365. At that time it was too late to recover from the widow.

Nevertheless, irrespective of the reasonableness of the Government's reliance on these decisions of

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[1] *Warner* v. *Walsh*, 15 F. (2d) 367 (C. C. A. 2d); *United States* v. *Bolster*, 26 F. (2d) 760 (C. C. A. 1st); *Allen* v. *Brandeis*, 29 F. (2d) 363 (C. C. A. 8th). See Government's brief in *Stone* v. *White*, No. 202, pp. 6–7.

[2] *Title Guarantee L. & T. Co.* v. *Commissioner*, 63 F. (2d) 621 (C. C. A. 5th).

the Circuit Courts of Appeals, we think it clear that petitioner must depend here on the strength of its own case and not on any alleged weakness of the defense of its adversary. *Champ Spring Co.* v. *United States,* 47 F. (2d) 1, 3 (C. C. A. 8th), certiorari denied, 283 U. S. 852 . Petitioner is seeking an extraordinary remedy to which it is entitled only if it shows an equitable as well as a legal right to the relief sought. We submit that petitioner has not made out a case in which justice and equity require the granting of the relief of mandamus. It was upon this ground that the court below arrived at its decision, and like considerations have produced like results in similar cases in other courts. See *Rose* v. *McEachern,* 86 F. (2d) 231 (C. C. A. 5th), pending on writ of certiorari, No. 750, 1936 Term); *Crossett Lumber Co.* v. *United States,* 87 F. (2d) 930 (C. C. A. 8th); *United States Paper Exports Ass'n* v. *Bowers,* 80 F. (2d) 82 (C. C. A. 2d); *Lit* v. *United States* (E. D. Pa.), decided February 26, 1937, not yet reported but may be found in 1937 CCH, Vol. 4, Par. 9142; *First Nat. Bank of Birmingham* v. *United States,* 12 F. Supp. 301 (N. D. Ala.). As was said by the Circuit Court of Appeals for the Second Circuit in *United States Paper Exports Ass'n* v. *Bowers, supra,* where the taxpayer sued for a conceded overpayment of taxes but the facts showed that if a refund were made it would go to the stockholders of a new corporation which had taken over the assets of the plaintiff cor-

poration, and that this new corporation had received an erroneous refund which was barred from recovery in an affirmative suit by the statute of limitations (p. 85):

> But it is argued that in any event an erroneous refund to American cannot create any liability on the part of United. This is answered by considerations already noted, namely, that the refund was received by American upon the same trusts as the original deposit and in so far as not used to pay United's taxes must be turned back to United's former shareholders; and that United's recovery in the present action will inure solely to their benefit. These shareholders, in whose behalf United sues, should therefore be treated as owing to the United States the refund received by American for their benefit. In equity and good conscience the government has a better right than have they, or the nominal plaintiff, to the sum of $30,841.49 which was due under the consolidated return and refunded in error.

So also, in this case, in equity and good conscience the Government has a better right than does the widow or the nominal plaintiff, the petitioner, to the sums which petitioner seeks. A writ of mandamus was properly denied by the courts below.

4. The defense of recoupment is also available to respondent in this case. In addition to the ultimate objection that in equity and good conscience the taxpayer is not entitled to a recovery, we have

made in *Stone* v. *White* the additional point that the same result was to be reached on the basis of the defense of recoupment. We believe that recoupment is also available and supported by the facts in this case.

For the years 1924 and 1925, erroneous refunds were made to the widow here of the taxes paid by her on the income distributed by petitioner to her in those years. For the year 1928, taxes were due and not paid by her on similar income. Petitioner, however, erroneously paid taxes on the same income for the same years and is now seeking to recover those payments, and it is alleged and admitted by demurrer that if petitioner secures a refund, the money will go to the widow. The question here is thus identical with that in *Stone* v. *White*, and we refer the Court to pages 9–14 in our brief in that case for the argument and authorities supporting the defense of recoupment. In the instant case the additional fact exists that the widow is liable for erroneous refunds of taxes paid on the trust income distributed to her in 1926 and 1927. Whatever doubt there may be as to whether the liability of the widow for those years may be said to be so connected with the taxes erroneously paid by petitioner on the trust income for the years 1924 and 1925 that they may be deemed to have arisen out of some feature of the same transaction (*cf. Bull* v. *United States*, 295 U. S. 247, 262), the defense of recoupment is clearly good in so far as

the liability of the widow for the erroneous refunds for 1924 and 1925, and for taxes in 1928, is concerned. That liability is properly applied, on principles of recoupment, to the overpayments made by petitioner of taxes on the same income for those same years.

The fact that the refunds, which petitioner here seeks, have been determined by the Board of Tax Appeals to be overpayments, does not foreclose this defense, since, as we have pointed out (*supra*, p. 11), the Board of Tax Appeals is a tribunal of limited jurisdiction, and this defense could not have been pleaded before or considered by the Board. *Jones* v. *Commissioner*, 34 B. T. A. 280.

CONCLUSION

We submit that the decision of the court below, that a writ of mandamus was properly denied in this case, was correct and should be affirmed.

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APRIL 1937.

APPENDIX

Revenue Act of 1924, c. 234, 43 Stat. 253:

ESTATES AND TRUSTS

SEC. 219. (a) The tax imposed by Parts I and II of this title shall apply to the income of estates or of any kind of property held in trust, including—

* * * * *

(2) Income which is to be distributed currently by the fiduciary to the beneficiaries, * * *.

* * * * *

(b) * * * The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except that—

* * * * *

(2) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. * * *

Revenue Act of 1926, c. 27, 44 Stat. 9:

CREDITS AND REFUNDS

SEC. 284. (a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, * * * the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

* * * * *

(d) If the Commissioner has mailed to the taxpayer a notice of deficiency under subdivision (a) of section 274 and if the taxpayer after the enactment of this Act files a petition with the Board of Tax Appeals within the time prescribed in such subdivision, no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court except—

* * * * *

(2) As to any amount collected in excess of an amount computed in accordance with the decision of the Board which has become final; and

* * * * *

COURT REVIEW OF BOARD'S DECISION

SEC. 1001. [as amended by Section 603 of the Revenue Act of 1928, c. 852, 45 Stat. 791]. (a) The decision of the Board rendered after the enactment of this Act[1]

[1] Revenue Act of 1926, approved February 26, 1926.

* * * may be reviewed by a Circuit Court of Appeals, * * * if a petition for such review is filed by either the Commissioner or the taxpayer within six months after the decision is rendered.[2]

* * * * * *

(c) Notwithstanding any provision of law imposing restrictions on the assessment and collection of deficiencies, such review shall not operate as a stay of assessment or collection of any portion of the amount of the deficiency determined by the Board unless a petition for review * * * is duly filed by the taxpayer, and then only if the taxpayer * * * has filed with the Board a bond * * * conditioned upon the payment of the deficiency as finally determined, * * *.

(d) In cases where assessment or collection has not been stayed by the filing of a bond, then if the amount of the deficiency determined by the Board is disallowed in whole or in part by the court, the amount so disallowed shall be credited or refunded to the taxpayer, without the making of claim therefor, * * *. (U. S. C., Title 26, Secs. 641, 644, 645.)

DATE ON WHICH BOARD'S DECISION BECOMES FINAL

SEC. 1005. (A) The decision of the Board shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; * * *. (U. S. C., Title 26, Sec. 640.)

[2] Three months, under Section 1101 of the Revenue Act of 1932 (U. S. C., Title 26, Sec. 642).

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 272. PROCEDURE IN GENERAL.

(a) *Petition to Board of Tax Appeals.*—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. * * *

SEC. 322 [as amended, c. 277, 48 Stat. 756, Sec. 504 (a)]. REFUNDS AND CREDITS.

(a) *Authorization.*—Where there has been an overpayment of any tax imposed by this title, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

(b) *Limitation on allowance.*—

(1) *Period of Limitation.*—No such credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

* * * * *

(c) *Effect of petition to Board.*—If the Commissioner has mailed to the taxpayer a notice of deficiency under section 272 (a) and if the taxpayer files a petition with the Board of Tax Appeals within the time prescribed in such subsection, no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court except—

(1) As to overpayments, determined by a decision of the Board which has become final; and

(2) As to any amount collected in excess of an amount computed in accordance with the decision of the Board which has become final;

* * * * *

(d) *Overpayment found by Board.*—If the Board finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, the Board shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Board has become final, be credited or refunded to the taxpayer. No such credit or refund shall be made of any portion of the tax unless the Board determines as part of its decision that it was paid within two years before the filing of the claim or the filing of the petition, whichever is earlier.

SEC. 507. OVERPAYMENTS FOUND BY BOARD OF TAX APPEALS.

Section 284 (e) of the Revenue Act of 1926 is amended to read as follows:

"(e) If the Board finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, the Board shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Board has become final, be credited or refunded to the taxpayer as provided in subdivision (a). * * *."

SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.

Any tax * * * assessed or paid * * * after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim. (U. S. C., Title 26, Sec. 1670.)

SEC. 610. RECOVERY OF AMOUNTS ERRONEOUSLY REFUNDED.

* * * * *

(b) Any portion of an internal-revenue tax * * * which has been erroneously refunded * * * may be recovered by suit brought in the name of the United States, but only if such suit is begun before the expiration of two years after the making of such refund or before May 1, 1928, whichever date is later. (U. S. C., Title 26, Sec. 1646.)

Revised Statutes:

SEC. 3220 [as amended by Sec. 1111 of the Revenue Act of 1926, c. 27, 44 Stat. 115]. Except as otherwise provided in sections 284 and 319 of the Revenue Act of 1926, the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal-

revenue taxes collected by him, with the cost and expenses of suit; also all damages and cost recovered against any assessor, assistant assessor, collector, deputy collector, agent, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty, and shall make report to Congress at the beginning of each regular session of Congress of all transactions under this section.

SEC. 3226 [as amended by Sec. 1113 of the Revenue Act of 1926, 44 Stat. 116]. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail.

Judicial Code:

SEC. 24 [as amended]. The district courts shall have original jurisdiction as follows:

* * * * *.

Twentieth. * * * of any suit or proceeding commenced ofter the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced. * * * (U. S. C., Title 28, Sec. 41.)

SEC. 145. The Court of Claims shall have jurisdiction to hear and determine the following matters:

First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an Executive Department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: * * *. (U. S. C., Title 28, Sec. 250.)

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